United Nations A/70/285

General Assembly

Distr.: General
5 August 2015

Original: English

Seventieth session
Item 73 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion of a democratic and equitable international order

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the fourth report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, submitted in accordance with Assembly resolution 69/178.

* A/70/150.

15-12518 (E) 020915

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Report of the Independent Expert on the promotion of a democratic and equitable international order

Summary

The present report, the fourth of the Independent Expert to the General Assembly, focuses on the impact of investor-State dispute settlement on a democratic and equitable international order and builds on the forthcoming report to the Human Rights Council on international investment agreements (A/HRC/30/44). The Independent Expert calls on the General Assembly to request from the International Court of Justice an advisory opinion on the priority of the Charter of the United Nations and United Nations human rights conventions over other treaties.

I. Introduction

1. According to the *World Investment Report 2015*, growing unease with the current functioning of the global international investment agreement regime, together with today's sustainable development imperative, the greater role of Governments in the economy and the evolution of the investment landscape, has triggered a move towards reforming international investment rule seeking to make it better suited for today's policy challenges. As a result, the regime is going through a period of reflection, review and revision. As is evident from the United Nations Conference on Trade and Development (UNCTAD) World Investment Forum, held in October 2014, from the heated public debate taking place in many countries, and from various parliamentary hearing processes, including at the regional level, a shared view is emerging on the need for reform of the international investment regime to ensure that it works for all stakeholders. The question is not about whether to reform or not, but about the "what", "how" and "extent" of such reform.[1]

2. The present report, the fourth by the Independent Expert to the General Assembly, should be read in conjunction with his report submitted to the upcoming thirtieth session of the Human Rights Council (A/HRC/30/44), in which he analyses the operation of international investment agreements. The present report focuses on the investor-State dispute settlements that accompanies many international investment agreements and their adverse impacts on a democratic and equitable international order. The Independent Expert integrates analyses of the UNCTAD *Trade and Development Report, 2014*[2] and the *World Investment Report 2015* as well as reports of the Working Group on the issue of human rights and transnational corporations and other business enterprises of the Human Rights Council[3] and the special rapporteurs dealing with matters of foreign debt, food, water, health, the environment, extreme poverty, indigenous peoples, the independence of judges and lawyers and international solidarity. He acknowledges academic works in the field of the human rights obligations of non-State actors.[4]

3. The added value of the report lies in the identification of threats to the democratic and equitable international order posed by international investment agreements that are not anchored in human rights and by investor-State dispute

[1] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, United Nations publication, Sales No. E.15.II.D.5, chap. IV, introduction.

[2] United Nations publication, Sales No. E.14.II.D.4.

[3] Available from www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporations andotherbusiness.aspx.

[4] A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); A. Clapham, ed., *Human Rights and Non-State Actors* (Elgar, 2013); O. De Schutter, "The accountability of multinationals for human rights violations in European law", New York University School of Law, 2004; O. De Schutter, "Human rights and transnational corporations: paving the way for a legally binding instrument", workshop convened by Ecuador on 11 and 12 March 2014 during the twenty-fifth session of the Human Rights Council; H. Verbitsky and J. Bohoslavsky, *Cuentas Pendientes: Los Cómplices Económicos de la Dictadura* (Buenos Aires, Siglo XXI, 2013); International Commission of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights*; Amnesty International, "India: court decision requires Dow Chemical to respond to Bhopal gas tragedy", 3 July 2013; J. Wronka, *Human Rights and Social Justice: Social Action and Service for the Helping and Health Professions* (Sage, 2008); V. Nerlich, "Core crimes and transnational business corporations", *Journal of International Criminal Justice*, vol. 8, No. 3 (July 2010), pp. 895-908.

settlement arbitration regimes because they reduce the State's regulatory space and do not oblige the arbitrators to give priority to human rights treaty norms. It underlines the urgency of crafting future agreements in a way that prevents the abuses of the past and calls for a revamping of the existing 3,200 international investment agreements, more than 1,500 of which are due to expire.[5] The Independent Expert provides a fresh look from an independent perspective that places human rights at its centre and highlights pertinent provisions of the Vienna Convention on the Law of Treaties with a view to the revision or termination of some of these agreements and to the abolishment of investor-State dispute settlement as *contra bonos mores* and incompatible with provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. Pursuant to paragraph 6 of General Assembly resolution 69/178, the Independent Expert acknowledges that a democratic and equitable international order requires, inter alia, the realization of the right of peoples and nations to permanent sovereignty over their natural wealth and resources; the right of every human person and all peoples to development; international solidarity; the promotion of equitable access to benefits from the international distribution of wealth through enhanced international cooperation, in particular in international economic, commercial and financial relations; and the shared responsibility of the nations of the world for managing worldwide economic and social development, as well as threats to international peace and security, which should be exercised multilaterally.

5. Pursuant to paragraph 11 of the resolution, he has endeavoured to identify obstacles and undertaken to continue working urgently for the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation among all States. He is also conscious of the preventive aspect of the mandate and recalls the reaffirmation in paragraph 12 that the international community should devise ways and means to remove the current obstacles and meet the challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting therefrom.

6. In recent years there has been a growing awareness by States, intergovernmental organizations, non-governmental organizations and religious institutions,[6] that the international investment agreement regime poses grave dangers to the enjoyment of human rights, but no global solution has been devised, possibly because of the complexity of the issues and the power of transnational enterprises and investors, who consistently oppose reform. The unbiased observer will have no problem understanding the two basic ontologies at stake. First is the ontology of the State, which is to legislate in the public interest, adopting laws, regulations and practices for

[5] UNCTAD, *World Investment Report*, chap. IV, p. 162.

[6] See, inter alia, the speech by Pope Francis in Santa Cruz, Bolivia, on 10 July 2015: "The new colonialism takes on different faces. At times it appears as the anonymous influence of Mammon: corporations, loan agencies, certain 'free trade' treaties, and the imposition of measures of 'austerity' which always tighten the belt of workers and the poor." This is perhaps an echo of Saint Jerome: "*Homo mercator vix aut nunquam potest Deo placere*" ("A man who is a merchant can scarcely or never please God"). http://en.radiovaticana.va/news/2015/07/10/pope_francis_speech_at_world_meeting_of_popular_movements/1157291; www.latribunadejulian romero.blogspot.com.es/2014/10/couple-of-couplespar-de-pares.html?m=1.

the welfare of the persons living under its jurisdiction, including improvement of labour standards, food security, clean water, medical care, a healthy environment, adequate shelter and the administration of justice by a transparent and accountable system of courts. This ontology is seen by some as a social contract. The second ontology is that of investment, business, enterprise, banking and other free economic activity. By their very nature these activities entail risk-taking, which justifies an expectation of profit. But can there be a guarantee that an investor who speculates or a bank that gives loans without adequate equity will always draw a profit? No, because sometimes investors win, sometimes they lose. What is abnormal is for an investor to demand a guarantee of profit, to create a parallel system of extrajudicial dispute resolution, which often is not independent, transparent, accountable, or even appealable, and to seek to usurp the function of the State and encroach on government regulation of fiscal and budgetary matters in the public interest. The last 25 years have delivered numerous examples of abuse of rights by investors and unconscionable arbitral awards that have not only led to violations of human rights, but have engendered a "regulatory chill" or even a "regulatory freeze", stopping States from adopting regulations on waste disposal or tobacco control for fear of being sued before investor-State dispute settlement tribunals that protect speculators making risky investments and deny States their regulatory space, imposing instead "austerity measures" on social services. A parallel may be drawn between the bailout of delinquent banks during the financial crisis of 2007-2008, when billions of dollars were paid from the public treasury, and the current practice of rescuing speculative investors when they take risks without insurance. This is tantamount to the privatization of profits and the socialization of losses. The mandate-related question concerning obstacles to the realization of a democratic and equitable international order requires acknowledgement of the adverse impacts of international investor agreements and investor-State dispute settlement on human rights.

II. Paradoxes

7. Over the past 70 years, the United Nations has conducted a magnificent normative orchestra which has put on the world stage not only the Universal Declaration of Human Rights, but legally binding instruments including 10 core human rights treaties and countless declarations and resolutions such as the Declaration on the Establishment of a New International Economic Order, the Declaration on the Right to Development and the United Nations Declaration on the Rights of Indigenous Peoples. The noble task of codification and refining human rights norms continues. Moreover, the United Nations has established implementation mechanisms, including treaty based bodies like the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, which have advanced the work of standard-setting through the adoption of general comments on the provisions of the International Covenants and have engaged in monitoring activities, the examination of periodic State party reports and in situ visits. The Commission on Human Rights created the special procedures mechanism comprising working groups, special rapporteurs and independent experts, each of which is entrusted with a specific thematic or country mandate. Its successor, the Human Rights Council, has expanded on the issues covered by the special procedures and developed the universal periodic review. States have made pledges, for example, in connection with the Millennium Development Goals and the post-2015 development agenda. The Third International Conference on Financing for Development, held in

Addis Ababa in July 2015, resulted in the Addis Ababa Action Agenda and agreement on a draft outcome document[7] for the United Nations summit to adopt the post-2015 development agenda to be held in New York in September 2015, which merits significant strengthening. While the Independent Expert welcomes greater attention to financing for development, he is concerned that the existence of 3,200 international investment agreements and, in particular, of investor-State dispute settlements may render the implementation of the Action Agenda illusory.

8. Regionally, we have seen the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and its Protocols, the American Convention on Human Rights and the African Convention on Human and Peoples' Rights, all of them providing for human rights courts competent to adopt binding judgements. This enormous normative, monitoring and implementing activity manifests *opinio juris* generating an international customary international law of human rights that no State or non-State actor can ignore. Much has been written about the *erga omnes* character of the international human rights regime. What is needed is an explanation of how best to implement it and a clear statement from the International Court of Justice on the priority of human rights treaty obligations over other treaties.

9. Paradoxically, States enter into bilateral and multilateral free trade and investment treaties that hinder their compliance with human rights treaty obligations and result in the violation of civil, cultural, economic, political and social rights. Perhaps they follow the siren call of promised growth and employment, but seldom do they realize that investors are there for profit, will resist scrutiny by human rights bodies and reject legally binding obligations. Notwithstanding the foregoing, States are still bound by the International Covenants and must ensure that non-State actors operating in their territories do not violate human rights. States have a responsibility to protect, particularly with respect to the administration of justice. Article 14 of the International Covenant on Civil and Political Rights requires States to ensure that suits at law are examined by competent and independent tribunals in a regime of transparency and accountability.[8] Paradoxically, States have agreed to the creation of ad hoc investor-State dispute settlement tribunals that are frequently not independent, transparent or accountable. Studies have been published that manifest egregious abuses by specialized law firms in collusion with arbitrators and corporations using this system of "privatized justice" to escape adjudication before public courts under article 14. In the light of well-established and well-functioning domestic legal systems, investor-State dispute settlement offers no added value and yet, vested interests of powerful investors and transnational corporations have rendered it difficult to abolish it.[9]

10. Paradoxically, although States are bound to observe the public participation clause of article 25 of the International Covenant, they negotiate treaties in secret and exclude key stakeholders, including labour unions, consumer unions, health

[7] "Transforming our world: the 2030 agenda for sustainable development". Available from https://sustainabledevelopment.un.org/content/documents/7891TRANSFORMING%20OUR%20WORLD.pdf.

[8] Human Rights Committee, general comment No. 33 (2009).

[9] P. Eberhardt and C. Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Brussels/Amsterdam, Corporate Europe Observatory, 2012); Corporate Europe Observatory, "Profiting from crisis. How corporations and lawyers are scavenging profits from Europe's crisis countries", 2014.

professionals and environmental protection groups. Sometimes, secret treaties are fast-tracked through parliaments so as to avoid public participation. This renders the agreements democratically illegitimate.

11. Are the legally binding obligations of States under human rights treaties then meaningless, just because there is no tribunal competent to impose sanctions on States that violate their responsibility to protect and no enforcement mechanism against investors? Are the legal obligations under human rights treaties inferior to treaty obligations under free trade and investment agreements? Are human rights treaties only a moral fig leaf for globalization?

12. Notwithstanding good diagnoses formulated, inter alia, by UNCTAD and the perceptive analysis of experts including Joseph Stiglitz, Paul Krugman and Jeronim Capaldo, pressures by transnational corporations continue to drive Governments to new international investment agreements with investor-State dispute settlement provisions that will aggravate matters and ultimately result in a breakdown of the system or even a crisis situation in which local, regional or international peace and security will be endangered.

13. A reason given for the establishment of investor-State dispute settlement tribunals is that investors did not trust national justice systems and preferred to create a separate jurisdiction for commercial disputes. It is difficult to understand why any State would accept the implicit disqualification of its national courts and consent to the creation of a privatized system of dispute settlement that has been widely recognized as lacking independence, transparency and accountability.

III. Core norms and principles

14. All States Members of the United Nations are bound by the Charter, which is akin to a world constitution. Article 103 of the Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." This means that bilateral and multilateral free trade and investment agreements that contain provisions that conflict with the Charter must be revised or terminated, and incompatible provisions must be severed according to the doctrine of severability.[10]

15. Pursuant to the cardinal norm of international law *pacta sunt servanda*, enshrined in article 26 of the Vienna Convention on the Law of Treaties, existing treaties must be implemented "in good faith", and no subsequent treaty can be considered legitimate if it hinders the performance of commitments under existing treaties unless the parties explicitly agree to modify the previous treaties. Inadvertent incompatibilities can be resolved in good faith by interpreting the subsequent treaty in a manner consistent with the prior treaty, applying articles 31 and 32 of the Convention. Pursuant to Article 103 of the Charter, subsequent treaties must in any case conform to the Charter and are invalid if they impede the fulfilment of its purposes and principles, including its human rights provisions. The

[10] See the summary records of the International Law Commission; Human Rights Committee, general comment No. 24 (1994); Roslyn Moloney, "Incompatible reservations to human rights treaties: severability and the problem of State consent", *Melbourne Journal of International Law*, vol. 5, No. 1 (May 2004).

argument has merit that since most States parties to international investment agreements were already parties to United Nations human rights treaties, including the International Covenants, the principle of *pacta sunt servanda* requires the implementation of these United Nations treaties and the international investment agreements must be interpreted and applied in a manner that does not contravene the Charter or United Ntaions treaties, including the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO), the Framework Convention on Tobacco Control of the World Health Organization (WHO), conventions of the Food and Agriculture Organization of the United Nations (FAO) and the United Nations Children's Fund (UNICEF) and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of the Economic Commission for Europe.

16. According to customary international law and article 53 of the Vienna Convention, treaties or treaty provisions that violate peremptory norms of international law (*jus cogens*) are *contra bonos mores* and therefore null and void.[11] This encompasses a category of contracts and treaties entailing unethical activities, or whose foreseeable consequences are contrary to the protective functions of the State. Thus, any treaty that hinders the ability of a State to fulfil its obligations under United Nations human rights treaties is incompatible with international *ordre public* and with the commitments undertaken by all States pursuant to the Charter. Similarly, so-called "leonine", or unequal, treaties, such as existed between some new States and former colonial Powers must be considered contrary to the Charter and incompatible with the principle of equality of States. The notion of *jus cogens* was further elucidated in the process of codification of article 41 of the draft articles on Responsibility of States for internationally wrongful acts (see A/56/10 and Corr.1), adopted by the International Law Commission in 2001.[12]

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[11] Hersch Lauterpacht, in the first Report on the Law of Treaties to the International Law Commission, suggested that "rules of international morality so cogent" could constitute principles of international public policy that void treaties. See *Yearbook of the International Law Commission 1953*, vol. II. See also Michael Akehurst, who argues that morality underpins the process through which conventional or customary rules acquire a peremptory character. M. Akehurst, "The hierarchy of sources in international law", *British Yearbook of International Law*, vol. 47, No. 1 (1975), pp. 273, 283. See further International Law Commission, summary records of the 683rd meeting (A/CN.4/SR.683) (1963), para. 45, available from http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr683.pdf&lang=EFS. Alfred Verdross advanced the position that the "higher interests of the whole international community" were capable of voiding "immoral treaties" in violation of a compulsory norm of general international law. A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, Springer, 1926), pp. 21 ff. See further A. Verdross, "Jus dispositivum and jus cogens", in *International Law in the Twentieth Century*, L. Gross, ed. (New York, Appleton-Century-Crofts, 1969), pp. 222-223; Hermann Mosler, *The International Society as a Legal Community* (Springer, 1980), p. 142; R. Y. Jennings, "Nullity and effectiveness in international law" in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (London, 1965), pp. 64, 74; G. Hernandez, "A reluctant guardian: the International Court of Justice and the concept of 'international community'", *British Yearbook of International Law*, vol. 83, No. 1 (2012), pp. 13-60.

[12] C. Tams and others, eds., *Research Handbook on the Law of Treaties* (Elgar, 2014). S. Talmon, "The duty not to recognize as lawful a situation created by the illegal use of force or other serious breaches of a *jus cogens* obligation" in C. Tomuschat and J.-M. Thouvenin, eds., *The Fundamental Rules of the International Legal Order* (Nijhoff, 2006).

17. When addressing macroeconomic problems and human rights violations ensuing from the usurpation of State functions by transnational enterprises, the "general principles of law" referred to in article 38 (1) of the Statute of the International Court of Justice come into play, including estoppel, *ex injuria non oritur jus*, the prohibition of abuse of rights,[13] *ultra vires* conduct and the invalidity of *contra bonos mores* agreements. Indeed, all systems of justice recognize that there are certain unwritten laws of humanity, as in Sophocles' *Antigone*, the very spirit of the law (Montesquieu), those immanent values that precede codification of norms. Experience with existing international investment agreements, in particular investor-State dispute settlement tribunals, raises multiple issues of abuse of rights. The essence of the doctrine of abuse of rights is found in the principle of Roman law, *sic utere jure tuo ut alienum non laedas*, which stipulates the exercise of individual rights in such a manner that does not harm others. Inherent to legal thinking is the notion that because all subjects of international law can abuse rights, controls on the exercise of such rights must be established as a matter of *ordre public*. Courts and arbitral tribunals must respect these general principles of law and the principle of equity recognized in the Statute of the International Court of Justice (art. 38 (2)).

18. Domestic and international criminal law as well as the Rome Statute of the International Criminal Court may be of relevance in the context of economic crimes, especially when economic and financial activities result in grave violations of human rights, including mass unemployment, dislocation of the agricultural sector, destruction of food security or even famine, food fraud, devastation of the environment, water pollution, radioactive contamination resulting in death from cancers and other health complications, genetic deformations and destruction of ecosystems (ecocide). Such activities are assaults on human dignity and crimes against humanity justiciable under article 7 (1) (k) of the Statute *juncto* the criminal law principle of reckless endangerment. Perpetrators can be the pharmaceutical industry; mining enterprises, in particular gold and uranium mining; and gas and petroleum extraction, fracking and ozone-destroying enterprises. Such crimes should be susceptible to universal jurisdiction.[14] The United Nations Convention against Corruption of 2003 may have relevance with regard to corporate activities, including bribing public officials. Hitherto, investor-State dispute settlement tribunals have not been required to take these treaties into account and have tended to privilege the economic interests of investors over the imperatives of protecting human rights and the environment.

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[13] A. Kiss, "Abuse of rights" in R. Wulfrum, *Max Planck Encyclopaedia of Public International Law*, vol. I (2006), pp. 20-26. M. Byers, "Abuse of rights: an old principle, a new age", *McGill Law Journal*, vol. 47 (2002), pp. 389-431. See for instance the reference to abuse of rights in *Trail smelter case (United States, Canada), Reports of International Arbitral Awards*, vol. III, p. 1905 and in article 300 of the United Nations Convention on the Law of the Sea: "States Parties shall fulfil in good faith the obligations ... in a manner which would not constitute an abuse of right". See also V. Paul, "Abuse of rights and bona fides in international law" in *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 28 (1977), pp. 107-130; B. O. Iluyomade, "The scope and content of a complaint of abuse of right in international law", *Harvard International Law Journal*, vol. 16 (1975), pp. 47-92.

[14] H. Pontell and G. Geis, eds., *White Collar and Corporate Crime* (Springer, 2007). Cf. Cesare Lombroso, "Delitti vecchi e deliti nuove", 1902, anticipating Edwin Sutherland's *White Collar Crime*, 1949.

19. Human rights treaties, general principles of law, customary international law, declarations and resolutions constitute a symbiosis of norms of hard law and soft law, an international *ordre public* essential to achieving a democratic and equitable international order. Together with domestic *ordre public* this legal regime overrides any attempt by investors to subvert the rule of law through international investment agreements that challenge the democratic safeguards of national legislative and judicial bodies.

20. It is consistent with the United Nations mandate to promote stability and cooperation by calling upon States to regulate the activities of investors and transnational enterprises registered or operating within their jurisdiction and to foreclose the threat or use of economic force in any manner inconsistent with the Charter.

IV. Investor-State dispute settlement

21. Investor-State dispute settlement is a rather recent and arbitrary construction, a privatized form of dispute settlement that accompanies many international investment agreements. Rather than litigating before local courts or invoking diplomatic protection, investors rely on three arbitrators who in confidential proceedings decide whether their rights and investment have been violated by a State. Whereas investor-State dispute settlement tribunals can entertain suits by investors against States, they do not entertain suits by States against investors, for example, when investors violate national laws and regulations, pollute the environment and the water supplies, introduce potentially dangerous genetically modified organisms, etc. A birth defect of investor-State dispute settlement is its "Trojan horse" quality: it was introduced into international investment agreements without full disclosure as to its potentially intrusive application, without the participation of key stakeholders at the time of elaboration and without public referendum, hence lacking democratic legitimacy. Bearing in mind their impacts, Governments have a duty to proactively inform constituents. Not doing so amounts to violating articles 19 and 25 of the International Covenant on Civil and Political Rights. The texts of many international investment agreements have only been obtained through freedom of information suits and Wikileaks revelations.

22. The *World Investment Report 2015* surveys the situation and presents a menu of options. Among the reasons given for the establishment and maintenance of investor-State dispute settlement tribunals is that they provide an additional avenue of legal redress and a more effective system of enforcement. This argument does not address the question whether such an avenue is really necessary, and whether it contributes to a fragmentation of international law, inconsistency in arbitral jurisprudence and a general lack of predictability, introducing a "chilling effect" on legitimate State regulation in the public interest. Another argument sometimes made in favour of investor-State dispute settlement is avoidance of cumbersome diplomatic protection. But is this a valid argument in the light of the Charter and customary international law? Diplomatic protection does have a long history in international relations and has proven to be a useful and frequently effective way of settling disputes, wholly in the spirit of Articles 1 and 2 of the Charter.

23. There are multiple reasons to oppose investor-State dispute settlement, based on the necessities of democratic governance, the administration of justice through

transparent and accountable courts, the doctrine of State sovereignty and human rights law. It is difficult to justify that investor-State dispute settlement grants foreign investors greater rights than domestic investors, thereby creating unequal competitive conditions. The lack of transparency of investor-State dispute settlement tribunals and concerns about the independence and impartiality of the arbitrators are fundamental problems that cannot be solved by "fixing" existing investor-State dispute settlement mechanisms, by using filters or limiting investors' access, for example by reducing the scope of the subject-matter. Investor-State dispute settlement creates artificial incentives to gain access to privatized arbitration, exposing host States to considerable legal and financial risks. Indeed, both the remuneration of arbitrators and lawyers' fees are unconscionably high. Investor-State dispute settlement awards have led States to abandon measures to protect public health and to lower environmental standards. The regulatory chill resulting from the mere existence of the investor-State dispute settlement system has dissuaded, and may in the future dissuade, States from taking measures to respect, protect and fulfil their human rights obligations and thus have a negative impact on the democratic and equitable international order.

24. Lori Wallach of the organization Public Citizen has shown how investment treaties "allow companies to challenge public interest regulations outside of domestic court systems before tribunals of three private-sector trade attorneys operating under minimal to no conflict of interest rules". Ska Keller, member of the European Parliament representing the European Greens, wrote that "[d]emocratic decision-making is forcefully going under the knife through international arbitration. The accused states have only two options: either they can be like others and take back the decisions they have made, or they can pay huge sums in compensation to the investor". Daniel J. Ikenson of the Cato Institute concludes that "investor-State dispute settlement turns national treatment on its head, giving privileges to foreign companies that are not available to domestic companies".[15] Indeed, investor-State dispute settlement poses a particular challenge to the democratic order, particularly when Governments that have been democratically elected to carry out specific social policies have been sued by investors precisely because of those democratically mandated policies.

25. Although international tribunals can and should declare frivolous cases inadmissible for abuse of the right of submission (see article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights) or abuse of procedure, investor-State dispute settlement tribunals seldom do so and entertain frivolous and vexatious litigation at huge expense to the parties, which is particularly harmful to developing countries.

26. According to the *World Investment Report 2015* there are 608 known investor-State dispute settlement cases in which 99 Governments have been respondents to one or more known claims. In 2014 investors initiated 42 known cases, 35 of which were brought by investors from developed countries and 5 by investors from developing countries; in 2 cases the nationality of the claimants is unknown. Counting from the start, the most frequently cited home States were the United States of America (129), the Netherlands (67), the United Kingdom of Great Britain and Northern Ireland (51), Germany (42) and France (36). The respondent States

[15] http://csis.org/files/publication/141029_investor_state_dispute_settlement.pdf. See also http://ttip2015.eu/blog-detail/blog/isds%20risks.html.

most frequently concerned were Argentina (56), Venezuela (36), the Czech Republic (29) and Egypt (24). UNCTAD publishes a revealing chart showing the results of decisions on the merits indicating that 60 per cent were in favour of the investor and 40 per cent in favour of the State. It should be recalled that investor-State dispute settlement only takes cases of investors against States and does not accept suits by States against investors. Thus, the 60 per cent of cases lost by States do hurt and the billions of dollars awarded to investors are ultimately paid by the public, meaning that there is that much less money available for education, health care or infrastructure. Statistics show that about 64 per cent of the awards went to companies with over $10 billion in annual revenue and 29 per cent to companies with between $1 billion and $10 billion in annual revenue, or to individuals with a net wealth of over $100 million, indicating that the primary beneficiaries of financial transfers in investor-State dispute settlement awards have been ultra-large companies and super-wealthy tycoons. The largest award, in the *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation* cases, amounted to over $50 billion and the legal fees exceeded $60 million. Other awards have affected countries like Ecuador which in 2012 was ordered to pay $2.3 billion to Occidental Petroleum (see para. 30 below).

27. A report to the General Assembly is too short to lay out the human rights incompatibilities of investor-State dispute settlement, but one may address a few symptomatic problems for which there is no "quick fix". The list of *contra bonos mores* investor-State dispute settlement awards is long. The present report cannot summarize them, not only because of space limitations, but out of moral vertigo.

28. *Metalclad v. Mexico*. A case under the North American Free Trade Agreement (NAFTA) concerned a waste management business, Metalclad, which sued Mexico, claiming indirect expropriation (E/CN.4/Sub.2/2003/9, paras. 33 ff). In 1993, Metalclad had purchased a local waste management company with a view to building and operating a waste landfill facility. The project was subject to permits from the municipal, state and federal levels of government. Although the municipality had previously denied the permit, Metalclad went ahead. Because of environmental concerns and the opposition of local inhabitants, municipal authorities never issued the permits. Finally, state authorities issued an ecological decree declaring the area a natural reserve, forcing the waste management project to close. The investor-State dispute settlement tribunal found that the Government had taken a measure tantamount to expropriation and ordered Mexico to pay $16.7 million in compensation. Mexico sought statutory review of the decision and the Government of Canada intervened in the proceedings. A justice of the Supreme Court of British Columbia found that:

> The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110 [of the Agreement]. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property. This definition is sufficiently

broad to include a legitimate zoning of property by a municipality or other zoning authority.[16]

29. A study of the Subcommission on Promotion and Protection of Human Rights in 2003 noted:

> Such broad interpretations of expropriation provisions could have direct consequences for regulations intended to promote and protect human rights ... government action in relation to chemicals and toxic wastes has flow-on effects in relation to the enjoyment of human rights such as the right to health or the right to water ... One commentator has suggested that broad interpretations of expropriation provisions could reverse the established tenet of environmental policy that the polluters should bear the cost of their pollution rather than be paid not to pollute (E/CN.4/Sub.2/2003/9, para. 35).[17]

30. *Occidental Petroleum v. Ecuador*. On 5 October 2012, a split tribunal of the International Centre for Settlement of Investment Disputes determined that Ecuador had breached a bilateral investment treaty between the United States and Ecuador and awarded damages of $2.3 billion, then the largest award ever issued by such a tribunal. The award demonstrates the vast power that tribunals wield and raises important normative questions about the International Centre.[18] Although the tribunal found that Occidental had illegally sold 40 per cent of its production rights to another firm without government approval, despite a specific provision in the concession contract stating that the sale of production rights without government pre-approval would constitute a material breach of the contract, and notwithstanding the fact that the contract explicitly enforced Ecuador's hydrocarbons law, which protects the Government's prerogative to vet companies seeking to produce oil in the environmentally sensitive Amazon region, two out of the three arbitrators decided to put aside Ecuador's concerns about the breach of contract by Occidental and found in favour of the transnational, applying an abstruse proportionality argument. The dissenting arbitrator expressed complete disagreement with the award.[19] Ecuador subsequently filed a request for annulment of the award; decision is pending.

31. *Renco v. Peru*. The Renco Group is currently using the investor-State dispute settlement mechanism to evade justice for causing massive pollution in La Oroya, Peru, where its subsidiary, Doe Run, has failed to fulfil its commitments to limit emissions and clean up grievous pollution. Peru gave Doe Run two extensions to halt the pollution. When the Government refused to grant a third extension on the company's unfulfilled 1997 commitment to install pollution mitigation devices and assume its liability for the health damage already caused, Renco used the investor-State dispute settlement tactic to pressure the Government to allow it to reopen its smelter without installing pollution-capturing devices. Investor-State dispute

[16] *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, Reasons for judgement of the Honourable Mr. Justice Tyson, 22 May 2001, para. (99).

[17] Citing *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (Winnipeg, Canada, International Institute for Sustainable Development and World Wildlife Fund, 2001), p. 33. See also https://gusvanharten.files.wordpress.com/2015/05/appendix-c-opinion-articles-of-g-van-harten.pdf.

[18] http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/.

[19] International Centre for Settlement of Investment Disputes, *Occidental Petroleum Corporation v. Ecuador* (case No. ARB/06/11), award, 5 October 2012, para. 527.

settlement has thus been used to evade justice in Peru. Meanwhile, in the United States, beginning in October 1997, 11 personal injury lawsuits against Renco and Doe Run were filed in Missouri state courts on behalf of 162 sick Oroyan children. Proceedings in the cases have stopped pending the outcome of the investor-State dispute settlement arbitration.[20]

32. *Chevron v. Ecuador*. One of the most problematic cases from the aspect of conduct *contra bonos mores* and abuse of rights on the part of the investor-State dispute settlement claimants is *Chevron v. Ecuador*. The case started with a series of judicial proceedings under Ecuadorian law against Texaco (previous corporate name) because of environmental damage caused by Texaco's operations in the Amazon. In a pristine rainforest environment, Texaco dug 350 oil wells and, upon leaving Ecuador, left behind some one thousand open-air, unlined waste pits filled with crude and toxic sludge. The pits subsequently leaked into the water table, polluting rivers and streams that tens of thousands of people depend on for drinking, cooking, bathing and fishing. Chevron is also accused of responsibility for dumping more than 18 billion gallons of toxic wastewater — a byproduct of the drilling process — into the rivers. At the height of its operations, the company was dumping 4 million gallons per day, a practice outlawed in major United States oil-producing states decades before the company began operations in Ecuador in 1967. By handling its toxic waste in Ecuador in ways that were illegal in its home country, Texaco saved an estimated $3 per barrel of oil produced. A public health crisis of immense proportions occurred in the Ecuadorian Amazon, the root cause of which was massive contamination from 40 years of oil-drilling operations. The contamination contributed to cancers, miscarriages, birth defects and other ailments. In 2011 the Supreme Court of Ecuador sentenced Chevron to pay $9.5 billion in damages. Chevron refused to pay and instead sued Ecuador under the United States-Ecuador bilateral investment treaty for loss of profits (see A/HRC/21/47 and A/HRC/24/41). The case has been going on for several years and attorneys' fees are already in the millions of dollars.

33. Meanwhile, the Permanent Court of Arbitration at The Hague found in favour of Ecuador, which sought to pursue its claims for environmental damage against Chevron despite settlement of the case;[21] however, no one knows how the case will eventually play out.

34. *Vattenfall v. Germany*. The Swedish energy provider Vattenfall filed an investor-State dispute settlement suit against Germany in May 2012, pursuant to the Energy Charter Treaty, demanding a reported $5 billion for Germany's decision to phase out nuclear power, a decision adopted in response to widespread German public opposition to nuclear power generation in the wake of the 2011 Fukushima nuclear power disaster in Japan. The German parliament amended the Atomic Energy Act to roll back a 2010 extension of the lifespan of nuclear plants and to abandon the use of nuclear energy by 2022. Vattenfall argues that Germany's policy change violates its obligations to foreign investors under the Energy Charter Treaty.

[20] www.italaw.com/cases/906. https://systemicdisorder.wordpress.com/tag/trans-pacific-partnership/.

[21] http://business-humanrights.org/en/hague-tribunal-rules-for-ecuador-in-investment-arbitration-with-chevron-govt%E2%80%99s-settlement-with-firm-did-not-preclude-oil-pollution-case-by-ecuadorian-plaintiffs.

Whereas Germany objected to Vattenfall's claim as "manifestly without merit", the investor-State dispute settlement decided in 2013 to allow the claim to proceed.[22]

35. *Philip Morris v. Uruguay*. WHO has repeatedly warned about the global health dangers posed by tobacco and 180 States have adhered to the Framework Convention on Tobacco Control. It is estimated that 70 per cent of the 8.4 million deaths attributable to tobacco in 2020 will occur in developing countries. One country that has taken the Framework Convention seriously is Uruguay. In a "David v. Goliath" confrontation, tobacco giant Philip Morris is suing Uruguay for its anti-tobacco regulations. Uruguay's gross domestic product in 2013 was about $55.7 billion, while Philip Morris's revenues the same year reached $80.2 billion. Philip Morris wants $25 million in compensation from Uruguay. If Philip Morris wins, it is likely to seriously compromise the WHO anti-tobacco campaign.[23] A decision from the International Centre for Settlement of Investment Disputes is expected later in 2015.

36. *Philip Morris v. Australia*.[24] This case is similar on the merits, but procedurally it demonstrates the abuse of rights prevalent in the investor-State dispute settlement system. In order to sue Australia, Philip Morris established a "shell" or "mailbox" company in Hong Kong, to take advantage of the Hong Kong-Australia bilateral investment treaty.[25]

37. *Vodaphone v. India*.[26] Using its Dutch subsidiary, Vodafone is suing India for $2.2 billion in connection with India's taxation of Vodafone activities deriving from a transaction conducted in a tax haven (Cayman Islands), although all the assets are in India. At issue is whether a State can adopt legislation to end tax avoidance, for example, through the General Anti-Avoidance Rule of the Finance Act 2012.

A. Conflict with regional legislation, decisions of human rights tribunals and the constitutional separation of powers

38. Conflict between investor-State dispute settlement rulings and European Union law has led to legal uncertainty and conflicting obligations for member States. The *Micula v. Romania* case concerned a Swedish company which had invested in Romania before the country's accession to the European Union. The company had taken up business incentives offered by the Government of Romania. However, when it acceded to the European Union, in order to comply with rules on State aid Romania discontinued its incentives programme. Micula sued Romania pursuant to the Romania-Sweden bilateral investment treaty. Investor-State dispute settlement awarded $250 million to Micula for violation of the investment agreement. In 2014, the European Union served an injunction on Romania provisionally ordering it not to pay the compensation because doing so would be

[22] www.isdscorporateattacks.org/#!energy/cqoo.

[23] www.who.int/fctc/signatories_parties/en/. www.triplepundit.com/2015/04/philip-morris-vs-uruguay-lawsuit-a-threat-to-smoking-restrictions-worldwide/. www.italaw.com/cases/460.

[24] *Philip Morris Asia Limited v. The Commonwealth of Australia*, Order of the High Court of Australia (Tobacco Plain Packaging Act). www.italaw.com/sites/default/files/case-documents/italaw1103.pdf. www.ag.gov.au/tobaccoplainpackaging.

[25] www.iisd.org/pdf/2012/iisd_itn_january_2012_en.pdf.

[26] www.southcentre.int/wp-content/uploads/2015/07/IPB3_India's-Experience-with-BITs_ENdf.

contrary to European legislation. This situation illustrates the risk incurred by member States when bringing legislation into line with European Union standards.[27]

39. In the case involving the Marlin mine run by the Goldcorp company in Guatemala, the Inter-American Commission on Human Rights had found that the mine should be closed because of the dangers to health posed by its operation. Under considerable pressure, however, the recommendation of the Inter-American Court of Human Rights was withdrawn, although the case continues before the Court on the basis of failure to secure lack of free, prior and informed consent.[28] In the case of the Mayoc mine in Peru, the Court declared the case admissible but did not order the suspension of operations, notwithstanding the dangers to the health of the indigenous communities in the region.[29] In other mining cases, military forces have been used to suppress public protest, mostly against local indigenous populations.

40. In the ongoing *Chevron v. Ecuador* litigation, investor-State dispute settlement arbitrators have repeatedly ordered the executive branch in Ecuador to prohibit the enforcement of the highest judicial instances of the country. This is tantamount to dismantlement of checks and balances and a violation of article 14 of the International Covenant on Civil and Political Rights. If anything is *contra bonos mores* it is this attack on the rule of law and on the constitutional separation of powers.

B. Chilling effect

41. In his 2014 report to the General Assembly (A/69/299), the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health noted that States are vulnerable to dispute settlement procedures when they give priority to their obligations under human rights treaties and thereby breach an obligation under an international investment agreement. This was the case when Ethyl Corporation submitted a claim against a public health decision by the Government of Canada to impose a trade ban on a gasoline additive produced by the corporation.[30] Canada chose to bend because of the high cost of arbitration and the danger of an adverse judgement. This illustrates how the mere existence of investor-State dispute settlement can create a chilling effect on States, dissuading them from fulfilling their right to health obligations.[31] Such disputes may also deplete the States' resources and affect their ability to progressively realize the resource-dependent aspects of the right to health. The fact that international investment agreements are treated as a "stand-alone legal code" and often do not contain references to the right to health contravenes *ordre public*. Hence,

[27] www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/.

[28] https://intercontinentalcry.org/inter-american-commission-on-human-rights-gives-in-to-pressure-from-guetamala/; www.oas.org/en/iachr/indigenous/protection/precautionary.asp; http://en.centralamericadata.com/en/article/home/Temporary_Closure_of_Marlin_Mine_Ordered_in_Guatemala. http://en.centralamericadata.com/en/search?q1=content_en_le:%22Inter-American+Commission+on+Human+Rights+%28IACHR%29%22.

[29] www1.umn.edu/humanrts/cases/69-04.html.

[30] *Ethyl Corporation v. Canada*, award on jurisdiction, judgement of 24 June 1998.

[31] D. Gantz, "The evolution of FTA investment provisions: from NAFTA to the United States-Chile Free Trade Agreement", *American University International Law Review*, vol. 19, No. 4 (2003), p. 684.

international investment agreements must be interpreted in a manner that does not conflict with human rights law because "the purpose of both development-stimulating investment treaties and human rights laws is to benefit individuals" (A/69/299, paras. 45 and 55).

42. The 2003 study of the Subcommission on Promotion and Protection of Human Rights referred to above had flagged the abuse of rights being perpetrated by investor-State dispute settlement tribunals (E/CN.4/Sub.2/2003/9, para. 32). That report gives many examples of the chilling effect, including the unconscionable suit brought by the Ethyl Corporation against Canada,[32] illustrating how government resources are wasted in litigation and how legitimate measures by States have been frustrated by investor-State dispute settlement.

43. The *Philip Morris v. Uruguay* case would probably have ended in surrender by Uruguay. Daunted by the prospect of paying contract lawyers $1,500 an hour for several years, President José Mujica almost settled the claim and only decided to defend Uruguay's laws after former President Vázquez voiced a protest and Michael Bloomberg, the former Mayor of New York City, decided to help finance Uruguay's defence team.[33] This justifies the establishment of an international fund for the defence of investor-State dispute settlement cases, modelled on the World Trade Organization (WTO) Technical Expertise Trust Fund for dispute settlement.[34]

44. It is reported that the mere threat of an investor-State dispute settlement case stopped Canada from banning the words "light" and "mild" in its tobacco control laws.[35]

45. Environmental regulation has also been under attack in Canada, as a former government official reported: "I've seen the letters from the New York and [Washington] DC law firms coming up to the Canadian government on virtually every new environmental regulation [...]. Virtually all of the new initiatives were targeted and most of them never saw the light of day".[36]

46. Threats of expensive lawsuits against Governments are becoming more frequent than actual claims. Thus, investor-State dispute settlement has mutated from a corporate shield against allegedly unfair behaviour by States into a tactical weapon to delay, weaken and kill regulation. Specialized law firms actually encourage their multinational clients to scare Governments into submission: "It's a lobbying tool in the sense that you can go in and say, 'Ok, if you do this, we will be suing you for compensation.' It does change behaviour in certain cases".[37]

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[32] The Ethyl Corporation case (1996-1998) is discussed in *Private Rights, Public Problems*, pp. 71-72.

[33] R. Stumberg, "Safeguards for tobacco control: options for the TPPA", *American Journal of Law and Medicine*, vol. 39, Nos. 2 and 3 (2013), pp. 382-441. TPPA stands for Trans-Pacific Partnership Agreement.

[34] www.acwl.ch/e/disputes/tech_exp_fund.html.

[35] www.citizen.org/documents/NAFTAReport_Final.pdf.

[36] http://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade.

[37] Ibid.

C. Dubious impartiality of investor-State dispute settlement tribunals

47. Critics of investor-State dispute settlement have pointed out that many arbitrators and corporations are "too close for comfort". A glaring example of the dysfunction of the annulment procedure for conflict of interests is provided by *Vivendi v. Argentina*.[38]

48. Argentina stated that one of the arbitrators, Gabrielle Kaufmann-Kohler, was acting as a member of the Board of Directors and a member of the Corporate Responsibility Committee of the Swiss bank UBS, which was the single largest shareholder in Vivendi. Argentina further argued that Ms. Kaufmann-Kohler was partially remunerated with UBS shares. While Argentina acknowledged that any issues regarding the ability of an arbitrator should be raised without delay during the arbitration proceeding, in this case it was not possible to do so because Argentina only learned about the facts and circumstances affecting her ability to serve as arbitrator in November 2007, after the award judgement of 20 August 2007 had been rendered. While the review committee was critical of the arbitrator's judgement and agreed with Argentina that the tribunal was not properly constituted and that annulment under article 52 (1) (a) of the Convention on the Settlement of Investment Disputes Between States and Nations of Other States could be supported, it declined to annul the award, holding that (a) the arbitrator's exercise of independent judgement was not actually impaired; (b) it would be unjust to deny the claimants the benefit of the award owing to the arbitrator's failures; and (c) the lengthy proceedings should "come to an end". This case, adjudicated by the International Centre for Settlement of Investment Disputes, illustrates that the International Centre's rules are insufficient to deal with conflicts of interest.

49. Under the current annulment procedure of the International Centre for Settlement of Investment Disputes, even ill-founded arbitral awards cannot be reversed. A review of the merits is not allowed; review is limited to grounds, such as irregular constitution or corruption of the arbitral tribunal, serious departure from a fundamental rule of procedure, failure to state reasons for the award or a manifest abuse of power. Hence, the International Centre annulment committee may find itself unable to annul or correct an award even after having identified "manifest errors of law".[39]

50. To counter investor-State dispute settlement abuse, domestic courts should deny enforcement of awards when such enforcement would be contrary to the public policy of their countries. This "public policy exception" to the enforcement of arbitral awards is found in article V (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) and the Model Law on International Commercial Arbitration, 1985 of the United Nations Commission on International Trade Law (UNCITRAL).[40] Regulations and ethical codes of conduct should be activated against investor-State dispute settlement abuses[41] to remove the impunity hitherto enjoyed by investor-State dispute

[38] www.italaw.com/documents/VivendiSecondAnnulmentDecision.pdf.

[39] UNCTAD, *World Investment Report 2015*, p. 180.

[40] Winnie Ma, "Public policy in the judicial enforcement of arbitral awards", thesis submitted for the degree of Doctor of Juridical Science, Bond University, Australia, 2005.

[41] C. Olivet and P. Eberhardt, *Profiting from Crisis: How Corporations and Lawyers are Scavenging Profits from Europe's Crisis Countries* (Amsterdam/Brussels, Transnational Institute and Corporate Europe Observatory, 2014). See also www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy.

settlement. Lawyers who are found to have benefited directly or indirectly from the awards rendered, for example, when they are subsequently hired by the very investors they represented, should be investigated and, if necessary, disbarred. Investigations for breaches of ethical conduct should be systematically conducted into the activities of law firms and arbitrators under established rules on conflict of interest and conspiracy.

51. International investment agreements must undoubtedly be revisited to ensure that they are compatible with modern international law, in particular that they acknowledge the pre-eminence of the Charter of the United Nations pursuant to Article 103. The conclusion is inescapable that while international investment agreements can be reformed in a way that will further human rights and sustainable development, investor-State dispute settlement arbitral tribunals are ontologically and conceptually flawed and fail the test of compatibility with the Charter and human rights norms. Lessons learned over the past decades indicate that "good practices" in investor-State dispute settlement experience are few and far between and that the harm caused by the investor-State dispute settlement system justifies its abolition. A further question arises concerning the criminal responsibility of investors and transnational corporations when their activities cause serious harm to the environment, pollute water supplies, endanger public health, destroy food security or result in mass transfer of populations, for example, in connection with "mega-development" projects, sometimes accompanied by violence and death. International criminal law in this field is gradually emerging.[42] Until now, investor-State dispute settlement has seemed blithely immune to such considerations.

52. The most fundamental argument against investor-State dispute settlement is that it subverts the rule of law so laboriously constructed over the past two hundred years by attempting to privatize justice. The establishment of a parallel system of dispute settlement, which is not transparent, accountable or even independent, cannot be tolerated. Moreover, no injustice is done to investors, because they have valid recourse options and can always rely on a functioning domestic administration of justice and/or on diplomatic protection.

[42] www.chathamhouse.org/event/corporate-responsibility-international-crimes. www.chathamhouse.org/sites/files/chathamhouse/field/field_publication_docs/INTA91_1_03_Ainleypdf. At an important conference held at the International Law Department of the University of Jaén, Spain, from 20 to 24 July 2015 on issues of economic crimes and universal jurisdiction, including a panel entitled "Crimenes económicos y financieros" moderated by Judge Baltasar Garzón and Professor Carmen Márquez, participants agreed that some economic crimes have consequences such that subjecting them to universal jurisdiction is justified. See also C. Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford University Press, 2002). L. Kaplan, "Some reflections on corporate criminal responsibility", address before the New York State Bar Association, 24 January 2007. Madrid Principles on Universal Jurisdiction, available from https://ujprinciples.wordpress.com/principles/.

V. Outlook

53. "Investment arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of disputes between sovereign nations and private investors."[43]

54. The UNCTAD "action menu" laid out in the *World Investment Report 2015* presents several reform options, but stops short of recommending abolition of investor-State dispute settment. The Independent Expert strongly believes that maintaining investor-State dispute settment is not an option and concludes that it should be abolished as a fundamentally flawed system having adverse human rights impacts and because its operation has upset the international order by debilitating States, encroaching on their regulatory space and aggravating inequality and inequity in the world. A history of abuse by arbitrators and interpretative practices well beyond articles 31 and 32 of the Vienna Convention on the Law of Treaties vitiates the system. Repeated findings by United Nations bodies notwithstanding, including the 2003 report of the Subcommission and the reports of several special procedures mandate holders,[44] have remained without effect, since the arbitrators have continued their practice of extensive interpretations and disregard of the human rights impacts. On the basis of the doctrine of abuse of rights and the prohibition of *contra bonos mores* agreements, investor-State dispute settlement should be abolished together with the "survival clauses", which provide for the continued application of treaties after their termination. This can be done pursuant to the doctrine of severability without abandoning the entire international investment agreements.

55. Investor-State dispute settlement could be replaced by any of the following options, or a combination thereof:

(a) The creation of an international investment court where the judges would be bound not only to take into account, but to give priority to the Charter and the core United Nations human rights treaties; a court that would have competence to examine suits brought by investors against States and by States against investors and that would allow mutual counter-claims. A standing international investment court, it would replace the system of multiple ad hoc arbitral tribunals with a single institutional structure. The court would be established by treaty and could have some institutional relationship with the United Nations, as do the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court. The court could even be incorporated into the United Nations system pursuant to articles 57 and 63 of the Charter as, for instance, a yet-to-be-created world court on human rights or a world court on the environment. The judges would be appointed or elected by States on a

[43] Quoted in http://works.bepress.com/matthew_rimmer/178/ and reflected in an open letter signed by 100 leading professors, judges and lawyers from Trans-Pacific Partnership countries, including Justice Elizabeth Evatt, former member of the Human Rights Committee, urging the rejection of investor-State dispute settlement. Available from https://tpplegal.wordpress.com/open-letter/.

[44] A/69/299, A/HRC/19/59/Add.5, A/HRC/25/57 and the forthcoming reports of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, and the Special Rapporteur on the rights of indigenous peoples to the General Assembly at its present session.

permanent basis. Most importantly, the international investment court would have an appeals chamber;

(b) A State-State dispute settlement mechanism similar to that of WTO. Under this procedure the home State would have discretion over whether to bring a claim and States would decide on the court that should hear the case, for example, the International Court of Justice or ad hoc tribunals with appeal chambers;

(c) Exclusive reliance on domestic dispute resolution. This option would abolish the right of investors to bring claims against host States in international tribunals and direct them to the jurisdiction of the States where they are operating and making a profit. This is the essence of the Calvo doctrine.[45]

56. The Independent Expert endorses the conclusions of the Special Rapporteur on the right to health contained in his previous report to the General Assembly, in particular his finding that although international investment agreements may contribute to the economic development of a country, States must ensure that protection of human rights, including the right to health, is incorporated into those agreements:

> ... Human rights must be respected, protected and fulfilled at all times, and should be the primary concern of all action by States. International investment agreements should therefore expressly provide for States' human rights obligations, which should be able to override investors' rights in specific cases.
>
> The ability of individuals to enjoy their right to health cannot be subject to contractual rights of investors, given that the right to health is fundamental to the dignity of individuals (A/69/299, paras. 57-58).

57. The Independent Expert endorses the Special Rapporteur's finding that:

> The magnitude of violations by transnational corporations and the ease with which they can evade responsibility for such violations call for an international mechanism to hold them liable for human rights abuses. Such a mechanism should supplement domestic laws rather than diminish the importance of domestic law. The mechanism should therefore enable States and individuals to hold transnational corporations to account for their human rights violation (ibid., para. 38).

58. The Independent Expert concludes that the abolition of investor-State dispute settlement does no injustice to investors, who can still avail themselves of the domestic courts and/or the well-tried mechanism of diplomatic protection. In addition, the World Bank offers risk insurance, and this should be factored in as a normal cost of doing business. Notwithstanding the imposition of some necessary limits on the hybrid dogmas of market fundamentalism and the doxology of free trade, investors will continue making handsome profits and, precisely by accepting the principles of transparency, accountability and other reasonable public-oriented regulations, they ensure the continuation of a healthy system of free markets accompanied by sustainable development.

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[45] P. Juillard, "Calvo Doctrine/Calvo Clause", in Wolfrum, pp. 1086-1093 (2012). See also International Law Commission, "Third report on diplomatic protection by John Dugard, Special Rapporteur" (2002) (A/CN.4/523/Add.1); C. Dalrymple, "Politics and foreign direct investment: the Multilateral Investment Guarantee Agency and the Calvo Clause", *Cornell International Law Journal*, vol. 29, No. 1 (1996), pp. 1161-1189.

VI. Recommendations

59. **In the light of the obstacles to a democratic and equitable international order outlined above, the Independent Expert refers to the Plan of Action he formulated in his report to the Human Rights Council (A/HRC/30/44, sect. VII) and offers further recommendations.**

A. To States

60. **States should abolish the investor-State dispute settlement system and replace it with an international investment court, State-to-State settlement before the International Court of Justice or by domestic courts bound by article 14 of the International Covenant on Civil and Political Rights.**

61. **States should endeavour to modify or terminate existing international investment agreements and refrain from entering international investment agreements with investor-State dispute settlement provisions. Before entering any new international investment agreements, States should ensure that independent ex ante human rights, health and environmental impact assessments are conducted. Provision for ex post assessments should be made.**

62. **States should use domestic and international law, including penal law, to suppress economic crimes and financial and banking speculation, apply and strengthen the precautionary principle in the protection of public health and the environment and rigorously enforce environmental and health standards.**

63. **States should impose penal sanctions on white-collar crimes and corruption. They should ratify the United Nations Convention against Corruption.**

64. **States should finish the elaboration of and adopt a legally binding convention that covers corporate social responsibilities and strengthens the implementation of the Guiding Principles on Business and Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples.**

65. **Until investor-State dispute settlement is abolished, States should establish a fund for the defence of investor-State dispute settlement cases modelled on the WTO Advisory Centre on WTO Law.**

B. To the General Assembly

66. **The General Assembly may consider inviting UNCTAD to convene a conference to revise or terminate international investment agreements that have resulted in human rights violations.**

67. **The General Assembly may consider tasking the Human Rights Council with a specific mandate on periodic monitoring of the adverse impacts of the international investment regime on the enjoyment of civil, cultural, economic, political and social rights, for example by expanding the scope of examination under the universal periodic review.**

68. The General Assembly may consider ways to put into effect the ILO and World Bank initiative for universal social protection[46] and provide for adequate financing thereof.

69. The General Assembly may consider establishing a commission to monitor the impact of arbitral awards on the paramount obligation of States to promote and protect human rights.

70. Bearing in mind that the International Court of Justice, as the highest judicial body of the United Nations can render an authoritative legal statement on international investment agreements, including investor-State dispute settlement, the General Assembly may, pursuant to article 96 of the Charter, request an advisory opinion on:

(a) The legal consequences of the priority of the Charter over all other treaties, pursuant to its Article 103, in particular with regard to international investment agreements and investor-State dispute settlement awards;

(b) The priority of the international human rights regime, including the International Covenants as well as FAO, ILO, UNICEF and WHO conventions, over conflicting obligations under trade and investment agreements;

(c) The application of norms of customary international law to non-State actors, in particular the respect for the sovereignty and independence of States and the prohibition of interference in matters that are essentially within the domestic jurisdiction of States;

(d) The responsibility of a home or host State for the actions of a transnational corporation registered or operating in its territory;

(e) The scope of State sovereignty and the ontological obligation of every State to legislate and regulate for the welfare of the population, in particular the obligation of States pursuant to the international human rights treaties not to regress in human rights protection and not to allow external actors to dictate their fiscal, budgetary, social, labour, health, educational or environmental policies;

(f) The application of article 53 of the Vienna Convention on the Law of Treaties to investment agreements that contain provisions that are *contra bonos mores* or violate *jus cogens*;

(g) The legal status of privatized systems of justice that are not transparent or accountable nor subject to appeal, especially in the light of article 14 (1) of the International Covenant on Civil and Political Rights; the compatibility of investor-State dispute settlement tribunals with the principle of the rule of law; the obligation of investor-State dispute settlement arbitrators to take international human rights treaties into account;

(h) The validity of investor-State dispute settlement awards, the necessity of appealability and the consequences of *ex tunc* invalidity;

(i) The primacy of State sovereignty over arbitral tribunals and the right of sovereign States to refuse to execute arbitral awards that entail violations of human rights;

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[46] www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_378984/lang--en/index.htm.

(j) **The right of third States to refuse execution of arbitral awards that are *contra bonos mores*, notwithstanding the Convention on the Recognition and Enforcement of Foreign Arbitral Awards;**

(k) **The obligation of States to modify or terminate international investment agreements that have led to or are likely to lead to violations of human rights;**

(l) **The modalities of modification or termination of bilateral and multilateral free trade and investment agreements, pursuant to the Vienna Convention on the Law of Treaties, and the application of the principle of severability;**

(m) **The responsibility of State courts to investigate corruption and collusion in connection with the operation of investor-State dispute settlement and to impose punitive damages on investors who engage in frivolous and vexatious litigation against the State's regulatory competences.**

C. To transnational enterprises

71. **In the interrelated and interdependent world of the twenty-first century, plagued as it is by extreme poverty and where population growth announces threats to food security and the environment, energy scarcity, etc., international solidarity should engender concrete action. Enterprises should spend more of their profits for the promotion of human rights in the countries where they operate. They should take all necessary measures to ensure that their activities do not damage the environment, pollute, limit access to generic medicine, etc. They should comply with national and international regulation whereby the public must be informed of the dangers of tobacco consumption, genetically modified organisms, waste disposal, water pollution, etc.**

72. **Transnational enterprises that are adversely affected by unilateral sanctions condemned by the General Assembly and the Human Rights Council should test their validity before the WTO dispute settlement mechanism, UNCITRAL or the International Centre for Settlement of Investment Disputes and/or invoke pertinent clauses in existing friendship, commerce and navigation treaties to refer disputes to the International Court of Justice.**

D. To civil society

73. **Considering the grave democratic deficits of international investment agreements, in particular the secrecy of their elaboration and negotiation, the exclusion of key stakeholders and the adverse human rights impacts of international investment agreements and investor-State dispute settlement, civil society should demand that public referendums be held on all future international investment agreements, including bilateral investment treaties, the Trans-Pacific Partnership, the Trans-Atlantic Trade and Investment Partnership and the Trade in Services Agreement, and that referendums be organized concerning the urgent revision or termination of existing international investment agreements, including NAFTA and the Central America Free Trade Agreement (CAFTA).**

74. **Individuals and groups should submit cases of human rights violations caused by the application of international investment agreements to regional human rights courts and denounce them in the social media.**

75. **Civil society should demand the expansion of the concept of crimes against humanity to encompass economic crimes that entail the destruction of ecosystems or grave financial dislocations through manipulation of commodity markets or currency speculation resulting in the gravest consequences for millions of people.**

VII. Postscript

76. **The Independent Expert is grateful that enhanced recognition of the mandate is leading to increased input from Governments, inter-governmental organizations, civil society and academia. He welcomes contact with stakeholders from all related fields and looks forward to engaging with them in the upcoming reporting year.**

77. **By way of conclusion, the Independent Expert would like to reiterate his expression of appreciation to the very hard-working and competent staff, of the Office of the United Nations High Commissioner for Human Rights (OHCHR), and requests the General Assembly to allocate greater resources to the Office.**

78. **The Independent Expert concludes with a note of optimism about the possibility of building, with good will and international solidarity, a peaceful, democratic and equitable international order. Major obstacles must be overcome, including the mythologies and fundamentalisms of the market. A sober analysis was given at the Ninth WTO Ministerial Conference, held in Bali, Indonesia, in December 2013, by Archbishop Silvano Tomasi on behalf of the Holy See:**

> **While a minority is experiencing exponential growth in wealth, the gap is widening to separate the vast majority from the prosperity enjoyed by those happy few. This imbalance is the result of ideologies that defend the absolute autonomy of the marketplace and of financial speculation. Consequently, there is an outright rejection of the right of States, charged with vigilance for the common good, to exercise any form of control. A new tyranny is thus born, invisible and often virtual, which unilaterally and relentlessly imposes its own laws and rules. An even worse development is that such policies are sometimes locked in through trade rules negotiated at the WTO or in bilateral or regional [free trade agreements]. Debt and the accumulation of interest also make it difficult for countries to realize the potential of their own economies and keep citizens from enjoying their real purchasing power. To all this, we can add widespread corruption and self-serving tax evasion, which have taken on worldwide dimensions. The thirst for power and possessions knows no limits. In this system, which tends to devour everything which stands in the way of increased profits, whatever is fragile, like the environment, is defenceless before the interests of a deified market, which become the only rule.**[47]

[47] www.wto.org/english/thewto_e/minist_e/mc9_e/stat_e/vat.pdf.